

1 Michael Louis Kelly - State Bar No. 82063
mlk@kirtlandpackard.com

2 Behram V. Parekh - State Bar No. 180361
bvp@kirtlandpackard.com

3 Heather M. Baker - State Bar No. 261303
hmb@kirtlandpackard.com

4 Amir D. Benakote - State Bar No. 277158
adb@kirtlandpackard.com

5 KIRTLAND & PACKARD LLP

2041 Rosecrans Avenue

6 Suite 300

El Segundo, California 90245

7 Telephone: (310) 536-1000

Facsimile: (310) 536-1001

8 *Counsel for Plaintiff and all*
9 *others similarly situated*

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12

13 KENT IBUSUKI, on behalf of himself
and all others similarly situated,

14 Plaintiffs,

15 v.

16 PEPSICO, INC., a North Carolina
17 Corporation, and DOES 1-10, inclusive,

18 Defendants.
19
20
21
22
23
24
25
26
27
28

Case No.

CLASS ACTION
COMPLAINT FOR:

**1. VIOLATION OF THE FALSE
ADVERTISING LAWS ("FAL");
Bus. & Prof. Code § 17500;**

**2. VIOLATION OF CALIFORNIA'S
UNFAIR COMPETITION LAWS
("UCL"); Bus. & Prof. Code § 17200
et seq.;**

**3. VIOLATION OF CALIFORNIA'S
CONSUMER LEGAL REMEDIES
ACT ("CLRA"); Civil Code § 1750 et
seq.**

DEMAND FOR JURY TRIAL

1 Plaintiff Kent Ibusuki (also referred to as "Plaintiff"), on behalf of himself
2 and all others similarly situated, alleges as follows. Plaintiff's allegations are based
3 on the investigation of counsel, and thus on information and belief, except as to the
4 individual actions of Plaintiff, as to which Plaintiff has personal knowledge.

5 **THE PARTIES**

- 6 1. Plaintiff Kent Ibusuki is a citizen and resident of Los Angeles County,
7 California who purchased Pepsi One (also referred to as the "Product") from
8 Ralphs near his residence on numerous occasions since Pepsi One was
9 introduced.
- 10 2. Plaintiff is informed and believes, and upon such information and belief
11 alleges, that PepsiCo, Inc. (also referred to as "Defendant") is a North
12 Carolina corporation, with its principle place of business in New York, that
13 markets, distributes, and/or sells Pepsi One. Defendant sells Pepsi One to
14 consumers in California and throughout the nation.
- 15 3. Plaintiff does not know the true names or capacities of the persons or entities
16 sued herein as DOES 1-10, inclusive, and therefore sues such DOE
17 Defendants by such fictitious names. Plaintiff is informed and believes, and
18 upon such information and belief alleges, that each of the DOE Defendants is
19 in some manner legally responsible for the damages suffered by Plaintiff and
20 the members of the Class as alleged herein. Plaintiff will amend this
21 Complaint to set forth the true names and capacities of these DOE Defendants
22 (PepsiCo, Inc. and DOE Defendants will jointly hereafter be referred to as
23 "Defendants") when they have been ascertained, along with appropriate
24 charging allegations, as may be necessary.
- 25 4. At all times herein mentioned, Defendants, and each of them, were the agents,
26 principals, servants, employees, and subsidiaries of each of the remaining
27 Defendants, and were at all times acting within the purpose and scope of such
28

agency, service, and employment, and directed, consented, ratified, permitted, encouraged, and approved the acts of each of the remaining Defendants.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), because at least one Class member is of diverse citizenship from one Defendant; there are more than 100 Class members nationwide; the aggregate amount in controversy exceeds \$5,000,000; and minimal diversity exists.
6. Venue is proper in this District under 28 U.S.C. § 1391(a) because a substantial part of the events or omissions giving rise to the claims occurred and/or emanated from this District, and Defendant has caused harm to Class members residing in this District.

FACTUAL ALLEGATIONS

7. PepsiCo touts itself as “one of the world’s leading food and beverage companies with over \$65 billion in net revenue in 2012.” While successful in swaying consumers to buy its products, Defendant is misleading consumers about one product in particular: Pepsi One.
8. Many soft drinks contain caramel color to turn them brown; but this coloring is not as harmless as it sounds. Some of this artificial coloring contains an impurity 4-methylimidazole (4-MeI), which in 2011 the International Agency for Research on Cancer determined to be “possibly carcinogenic to humans.”
9. Further, as of January 7, 2011, California Proposition 65's list of “Chemical Known to the State to Cause Cancer or Reproductive Toxicity”¹ named 4-MeI as a chemical that is known to the state to cause cancer or birth defects. As a result, any product that exposes consumers to more than 29 micrograms

¹ http://oehha.ca.gov/prop65/prop65_list/files/P65single013114.pdf

1 of 4-MeI are supposed to carry a health-warning label per California's Prop.
2 65.

3 10. Defendant's Pepsi One beverages contain this carcinogenic chemical, 4-MeI.
4 Further, a recent report² found that the amount of 4-MeI in Pepsi One
5 exceeded this 29 microgram threshold that California Proposition 65 has
6 established that would require Defendant to label Pepsi One with the health
7 warning label.

8 11. As a result of Defendant's omission, Plaintiff believed Pepsi One was safe to
9 consume. Plaintiff and the members of the Class would have never purchased
10 or consumed Pepsi One had they known it contained carcinogenic levels of 4-
11 MeI. A Proposition 65 warning would have properly warned Plaintiff and
12 other consumers that make up the Class about the possible associated risks
13 when consuming Pepsi One.

14 12. Plaintiff brings this lawsuit to enjoin the ongoing deception of thousands of
15 California and nationwide consumers by Defendant, and to recover the
16 monetary gains taken by this unlawful practice.

17 **CLASS DEFINITIONS AND CLASS ALLEGATIONS**

18 13. Plaintiff brings this action on behalf of himself and on the behalf of all others
19 similarly situated, as members of the Class or subclasses (collectively referred
20 to hereafter as the "Class") defined as follows:

21 (1) California Class: The Class that Plaintiff seeks to represent ("the
22 California Class") consists of all persons who are citizens or residents
23 of California who purchased and/or consumed any Pepsi One
24 beverages within the four years prior to the filing of the initial
25 complaint. Excluded from the Class are Defendant, any parent,
26

27
28 ²<http://www.consumerreports.org/cro/news/2014/01/caramel-color-the-health-risk-that-may-be-in-your-soda/index.htm>

1 subsidiary, affiliate or controlled person of Defendant, as well as the
2 officers and directors of Defendant, and the immediate family member
3 of any such person. Also excluded is any judge who may preside over
4 this case.

5 (2) Nationwide Class: The Class that Plaintiff seeks to represent ("the
6 Nationwide Class") is defined to include all persons in the United
7 States who purchased and/or consumed any Pepsi One beverages
8 within the four years prior to the filing of the initial complaint.

9 Excluded from the Class are Defendant, any parent, subsidiary, affiliate
10 or controlled person of Defendant, as well as the officers and directors
11 of Defendant, and the immediate family member of any such person.

12 Also excluded is any judge who may preside over this case.

13 14. This action is brought and may be properly maintained as a class action
14 pursuant to the provisions of Federal Rule of Civil Procedure 23(a)(1)-(4) and
15 23(b)(1)-(3). This action satisfies the numerosity, typicality, adequacy,
16 predominance and superiority requirements of those provisions.

17 15. [Fed. R. Civ. P. 23(a)(1)] The Class is so numerous that the individual
18 joinder of all of its members is impractical. While the exact number and
19 identities of Class members are unknown to Plaintiff at this time and can only
20 be ascertained through appropriate discovery, Plaintiff is informed and
21 believes the Class includes thousands of members. Plaintiff alleges that the
22 Class may be ascertained by the records maintained by Defendant.

23 16. [Fed. R. Civ. P. 23(a)(2)] Common questions of fact and law exist as to all
24 members of the Class, which predominate over any questions affecting only
25 individual members of the Class. These common legal and factual questions,
26 which do not vary from Class member to Class member, and which may be
27 determined without reference to the individual circumstances of any class
28 member, include, but are not limited to, the following:

- (a) Whether Defendant engaged in false or misleading advertising;
- (b) Whether Defendant's conduct violates the California Legal and Remedies Act ("CLRA") or other laws;
- (c) Whether Defendant's conduct is "unfair" or "unlawful" under *Business & Professional Code* Section 17200;
- (d) Whether, as a result of Defendant's misconduct, Plaintiff and the Class are entitled to damages, restitution, equitable relief and other relief, and the amount and nature of such relief.

17. [Fed. R. Civ. P. 23(a)(3)] Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff and all members of the Class have sustained injury and are facing irreparable harm arising out of Defendant's common course of conduct as complained of herein. The losses of each member of the Class were caused directly by Defendant's wrongful conduct as alleged herein.

18. [Fed. R. Civ. P. 23(a)(4)] Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff has retained attorneys experienced in the prosecution of class actions, including complex consumer and mass tort litigation.

19. [Fed. R. Civ. P. 23(b)(3)] A class action is superior to other available methods of fair and efficient adjudication of this controversy, since individual litigation of the claims of all Class members is impracticable. Even if every Class member could afford individual litigation, the court system could not. It would be an unduly burdensome to the courts in which individual litigation of numerous issues would proceed. Individualized litigation would also present the potential for varying, inconsistent or contradictory judgments, and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same complex factual issues. By contrast, the conduct of this action as a class action, with respect to some or all of the

issues presented herein, presents fewer management difficulties, conserves the resources of the parties and of the court system, and protects the rights of each Class member.

20. [Fed. R. Civ. P. 23(b)(1)(A)] The prosecution of separate actions by thousands of individual Class members would create the risk of inconsistent or varying adjudications with respect to, among other things, the need for and the nature of proper notice, which Defendant must provide to all Class members.

21. [Fed. R. Civ. P. 23(b)(1)(B)] The prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of the other Class members not parties to such adjudications or that would substantially impair or impede the ability of such non-party Class members to protect their interests.

22. [Fed. R. Civ. P. 23(b)(2)] Defendant has acted or refused to act in respects generally applicable to the Class, thereby making appropriate final injunctive relief with regard to the members of the Class as a whole.

FIRST CAUSE OF ACTION

Business and Professions Code § 17500

(Violation of the False Advertising Act)

(By Plaintiff and the Class Against Defendants)

23. Plaintiff hereby incorporates paragraphs 1-22 above as if set forth in full.

24. California *Business and Professions Code* § 17500 provides that “[i]t is unlawful for any ... corporation . . . with intent . . . to dispose of . . . personal property . . . to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated . . . from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other

manner or means whatever, including over the Internet, any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading”

25. Defendant misled consumers by withholding the proper warning and failing to disclose what is required as stated in the Code, as alleged above.
26. As a direct and proximate result of Defendant’s misleading advertising and withheld warning, Plaintiff and the members of the Class have suffered injury in fact and have lost money.
27. The failure to warn consumers regarding Defendant’s Pepsi One product presents a continuing threat to Plaintiff and the Class in that Defendant persists and continues to engage in these practices, and will not cease doing so unless and until forced to do so by this Court. Defendant’s conduct will continue to cause irreparable injury to consumers unless enjoined or restrained.

SECOND CAUSE OF ACTION

Business and Professions Code § 17200 et seq.

(Violation of the Unfair Competition Law)

(By Plaintiff and the Class Against Defendant)

28. Plaintiff hereby incorporates paragraphs 1-27 above as if set forth in full.
29. California *Business and Professions Code* § 17200 *et seq.* (the “Unfair Competition Law” or “UCL”) authorizes private lawsuits to enjoin acts of “unfair competition,” which include any unlawful or unfair business practice.
30. The UCL imposes strict liability. Plaintiff need not prove Defendant intentionally or negligently engaged in unlawful or unfair business practices — but only that such practices occurred. Further, in order to prevail on this cause of action, it is not necessary for Plaintiff to show that Defendant acted with intent or malice, nor is it necessary for Plaintiff to show Defendant’s

1 knowledge or scienter related to the false or misleading nature of Defendant's
2 claims.

3 31. The material misrepresentations, concealment, and non-disclosures by
4 Defendant as part of its marketing and advertising of Pepsi One beverages are
5 unlawful, unfair, and fraudulent business practices prohibited by the UCL.

6 32. In carrying out such marketing, Defendant has violated the Consumer Legal
7 Remedies Act, the False Advertising Law, and various other laws,
8 regulations, statutes, and/or common law duties. Defendant's business
9 practices alleged herein, therefore, are unlawful within the meaning of the
10 UCL.

11 33. The harm to Plaintiff and members of the public outweighs the utility of
12 Defendant's practices and, consequently, Defendant's practices, as set forth
13 fully above, constitute an unfair business act or practice within the meaning
14 of the UCL.

15 34. Defendant's practices are additionally unfair because they have caused
16 Plaintiff and the Class substantial injury, which is not outweighed by any
17 countervailing benefits to consumers or to competition, and which is not an
18 injury the consumers themselves could have reasonably avoided.

19 35. Defendant's practices, as set forth above, have misled the general public in
20 the past and will mislead the general public in the future. Consequently,
21 Defendant's practices constitute an unlawful and unfair business practice
22 within the meaning of the UCL.

23 36. Pursuant to Business and Professions Code § 17204, an action for unfair
24 competition may be brought by any "person . . . who has suffered injury in
25 fact and has lost money or property as a result of such unfair competition."
26 Defendant's wrongful misrepresentations and omissions have directly and
27 seriously injured Plaintiff and the putative Class by causing them to purchase
28 Pepsi One beverages based upon Defendant's failure to warn.

- 1 37. The unlawful, unfair, and fraudulent business practices of Defendant are
 2 ongoing and present a continuing threat that members of the public will be
 3 misled into purchasing Pepsi One beverages that contain a potentially serious
 4 carcinogen without any warning; they will be damaged financially and put
 5 themselves at risk for potential adverse health consequences.
- 6 38. Pursuant to the UCL, Plaintiff is entitled to preliminary and permanent
 7 injunctive relief ordering Defendant to cease this unfair competition, as well
 8 as disgorgement and restitution to Plaintiff and the Class of all of Defendant's
 9 revenues associated with its unfair competition, or such portion of those
 10 revenues as the Court may find equitable.

11 **THIRD CAUSE OF ACTION**

12 **Civil Code § 1750 et seq.**

13 **(Violation of the Consumer Legal Remedies Act)**

14 **(By Plaintiff and the Class Against Defendant)**

- 15 39. Plaintiff hereby incorporates paragraphs 1-38 above as if set forth in full.
- 16 40. The Consumer Legal Remedies Act creates a non-exclusive statutory remedy
 17 for unfair methods of competition and unfair acts or business practices. *See*
 18 *Reveles v. Toyota by the Bay*, 57 Cal. App. 4th 1139, 1164 (1997). Its self-
 19 declared purpose is to protect consumers against these unfair business
 20 practices and to provide efficient and economical procedures to secure such
 21 protection. Cal. Civil Code § 1760. The CLRA was designed to be liberally
 22 construed and applied in favor of consumers to promote its underlying
 23 purposes. *Id.*
- 24 41. Plaintiff has standing to pursue this claim, as Plaintiff purchased and
 25 consumed Pepsi One, and lost money as a result of such purchase along with
 26 exposing himself to potentially negative health risks. Plaintiff would have
 27 never purchased Pepsi One had he known it contained 4-MeI at a level that
 28 required a Proposition 65 warning.

42. Defendant's wrongful business practices constituted, and constitute, a continuing course of conduct in violation of the California Consumer Legal Remedies Act since Defendant is still representing that Pepsi One is safe to consume without any warning label, which is false and misleading.
43. More specifically, Plaintiff alleges that Defendant has violated paragraphs 5, 7, and 9 of Civil Code Section 1770(a) by engaging in the unfair and/or deceptive acts and practices set forth herein. Defendant's unfair and deceptive business practices in carrying out the marketing program described above were and are intended to and did and do result in the purchase of Defendant's Pepsi One by consumers, including Plaintiff, in violation of the CLRA. Cal. Civ. Code § 1770 *et seq.*
44. As a result of Defendant's unfair and/or deceptive business practices, Plaintiff and the putative class member have suffered damage and lost money in that they paid for a product that contains a potentially harmful carcinogen without being warned of such fact. Plaintiff seeks and is entitled to an order enjoining Defendant from continuing to engage in the unfair and deceptive business practices alleged herein.
45. Pursuant to Section 1782 of the CLRA, Plaintiff intends to notify Defendant in writing of the particular violations of Section 1770 of the CLRA (the "Notice Letter"). If Defendant fails to comply with Plaintiff's demands within thirty days of receipt of the Notice Letter, pursuant to Section 1782 of the CLRA, Plaintiff will amend this Complaint to further request damages under the CLRA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for relief and judgment as follows:

1. For preliminary and permanent injunctive relief enjoining Defendant, its agents, servants and employees, and all persons acting in concert with it, from

engaging in, and continuing to engage in, the unfair, unlawful and/or fraudulent business practices alleged above and that may yet be discovered in the prosecution of this action;

2. For certification of the putative class;

3. For restitution and disgorgement of all money or property wrongfully obtained by Defendant by means of its herein-alleged unlawful, unfair, and fraudulent business practices;

4. For an accounting by Defendant for any and all profits derived by Defendant from its herein-alleged unlawful, unfair and/or fraudulent conduct and/or business practices;

5. An award of statutory damages according to proof, except that no damages are currently sought on Plaintiff's Cause of Action regarding the Consumer Legal Remedies Act at this time;

6. An award of general damages according to proof, except that no damages are currently sought on Plaintiff's Cause of Action regarding the Consumer Legal Remedies Act at this time;

7. An award of special damages according to proof, except that no damages are currently sought on Plaintiff's Cause of Action regarding the Consumer Legal Remedies Act at this time;

8. Exemplary damages, except that no damages are currently sought on Plaintiff's Cause of Action regarding the Consumer Legal Remedies Act at this time;

9. For attorneys' fees and expenses pursuant to all applicable laws, including, without limitation, the CLRA and the common law private attorney general doctrine;

10. For costs of suit; and

11. For such other and further relief as the Court deems just and proper.

1 DATED: March 7, 2014
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

KIRTLAND & PACKARD LLP

By: 

MICHAEL LOUIS KELLY
BEHRAM V. PAREKH
HEATHER M. BAKER
Counsel for Plaintiff and the Class

JURY TRIAL DEMANDED

Plaintiff demands a jury trial on all issues so triable.

DATED: March 7, 2014

KIRTLAND & PACKARD LLP

By:



MICHAEL LOUIS KELLY
BEHRAM V. PAREKH
HEATHER M. BAKER
Counsel for Plaintiff and the Class

LAW OFFICES
KIRTLAND & PACKARD LLP


DECLARATION OF PROPER VENUE BY KENT IBUSUKI

I, Kent Ibusuki, declare as follows:

1. I am a Plaintiff in this action, and am a resident and citizen of the State of California. I have personal knowledge of the facts alleged herein and, if called as a witness, I could and would testify competently thereto.

2. The Complaint in this action, filed concurrently with this Declaration, is filed in the proper place for trial under Civil Code Section 1780(d) in that Los Angeles County is a county where Defendant does business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Kent Ibusuki